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In the Supreme Court of the United States

OCTOBER TERM, 1975

BROWN & WILLIAMSON TOBACCO CORPORATION, ET AL.,
PETITIONERS

v.

CALVIN J. COLLIER, CHAIRMAN, FEDERAL TRADE COMMISSION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 527 F.2d 1115. The opinion of the district court (Pet. App. 16a-20a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1975 (Pet. App. 3a). A timely petition for rehearing filed by petitioner American Brands, Inc., was denied on January 29, 1976 (Pet. App. 21a). The petition for a writ of certiorari was filed on March 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioners had a due process right to a stay of discretionary penalties for violation of Federal Trade Commission cease and desist orders, pending the determination of their suit challenging the Commission's interpretation of the orders.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment, Section 5(*l*) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (Supp. IV) 45(*l*), and Section 16(a)(1) of the Act, 52 Stat. 114, as amended, 15 U.S.C. (Supp. IV) 56(a)(1), are set forth at Pet. App. 1a-2a.

STATEMENT

On March 30, 1972, the Commission issued identical consent orders against each of the six petitioners, who are the major manufacturers of cigarettes in the United States (*e.g.*, C.A. App. A24-A35; 80 F.T.C. 455). The orders require that petitioners clearly and conspicuously disclose in their cigarette advertising the following statement, which under Section 4 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 283, as amended, 15 U.S.C. 1333, must appear clearly and conspicuously on the package labels of all cigarettes sold within the United States: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." For most media in which cigarettes are advertised, the orders specified in detail the type size, type style, configuration, location and color contrast necessary for the disclosure (Pet. App. 4a).

The Commission subsequently instituted a compliance investigation which led to negotiations between petitioners and members of the Commission staff with respect

to advertisements and practices that the staff viewed as violating the orders. These negotiations were unsuccessful and petitioners submitted to the Commission a detailed statement of their position (C.A. App. A226-A228). By letters dated August 1, 1975, the Commission advised petitioners that it believed that the advertising and practices violated the orders, that it intended immediately to notify the Department of Justice of its intention to initiate civil penalty actions with respect to certain violations, and that it would initiate actions with respect to other violations if petitioners failed to remedy them within 180 days (Pet. App. 22a-24a).[1]

On August 15, 1975, petitioners instituted a suit in the United States District Court for the Southern District of New York seeking a declaratory judgment that the Commission's interpretation of the consent orders is erroneous. The petitioners also asked that court to stay the further accumulation of penalties for violation of the orders pending final judgment in that suit. The district court denied the stay. It said that even assuming, *arguendo*, that petitioners had raised serious questions on the merits, a stay was unwarranted because petitioners had not shown that without a stay they would suffer irreparable injury or that the balance of the equities tipped decidedly in their favor (Pet. App. 16a-20a).[2]

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[1]Under Section 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. (Supp. IV) 56(a)(1), the Commission may itself file a civil penalty action only if it has notified the Attorney General of its desire to do so, and, after consultation with the Commission, the Attorney General declines to do so within 45 days of the request.

[2]Two months after petitioners filed the present suit, the United States filed in the United States District Court for the District of Columbia suits for civil penalties against petitioners, based on their alleged violations of the orders. On petitioners' motions, that court transferred those actions to the United States District Court for the Southern District of New York (Pet. App. 4a, n. 1).

The court of appeals affirmed (Pet. App. 3a-15a).[3] It held that due process did not require a stay of penalties while petitioners litigated the question whether they had violated the orders (Pet. App. 8a-13a). The court noted that petitioners were not challenging the validity of the Commission's orders but only the Commission's interpretation of them as they applied to the particular facts. The court observed that although petitioners theoretically risk large penalties if they are ultimately found to have violated the orders, the determination of penalties lay within judicial discretion and, "if petitioner's view of the meaning of the order is plausible and not defiant," the court would be unlikely to assess heavy penalties (Pet. App. 14a).

Finally, the court of appeals held that, in denying a stay under traditional equitable standards, the district court had not abused its discretion, particularly in view of the discretionary character of the penalties and the strong public interest in giving the public adequate warning of the dangers of cigarette smoking (Pet. App. 13a-15a). Petitioners do not seek review of that ruling.

ARGUMENT

Petitioners contend that the holding of the court of appeals that due process does not require a stay of penalties while they litigate the validity of the Commission's interpretation of the orders is inconsistent with *Ex parte*

[3]While the present case was *sub judice* before the court of appeals, the district court on November 4, 1975, dismissed petitioners' action for declaratory relief. Petitioners appealed from that ruling, and their appeals are pending before the court of appeals. The court of appeals declined to consolidate those appeals with petitioners' appeals from the denial of a stay, and concluded that the dismissal did not render those appeals moot "because still at issue is the question whether penalties that possibly accrued prior to the commencement of the District of Columbia action or the dismissal of the underlying complaint here should be stayed" (Pet. App. 4a, n. 1).

Young, 209 U.S. 123, *Wadley So. Ry. Co.* v. *Georgia*, 235 U.S. 651, *St. Louis, Iron Mt. & So. Ry. Co.* v. *Williams*, 251 U.S. 63, and *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331. As the court of appeals correctly noted (Pet. App. 8a-11a), those cases establish the principle that where a party challenges the validity of an administrative order or statute, for the violation of which "ruinous," "debilitating" or "confiscatory" penalties may be imposed, due process may require a stay of penalties to prevent the right to litigate the validity of the order or statute from becoming "nominal and illusory." They involve situations where the possible penalties are "so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law" (*Wadley So. Ry. Co.* v. *Georgia, supra*, 235 U.S. at 661).

This is not such a case, however, since petitioners make no claim that the denial of a stay will lead them to abandon their challenge to the Commission's ruling and acquiesce in it because of the fear of ruinous penalties if they fail in their litigation. Indeed, since under the Commission's view petitioners had been violating the order for almost three years when they filed the present suit (Pet. App. 6a; C.A. App. A224-A225), they could not convincingly contend that without a stay of further penalties they would be reluctant to litigate the question whether they have violated the orders.

The Due Process Clause has not been held to require a stay merely to avoid the imposition of substantial penalties—for when persons subject to an order undertake "to make their own determination of what the decree [means] * * * they [act] at their peril" (*McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192).[4] Its application has been designed to avoid placing a party in the position where

[4]Petitioners' reliance upon *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, is misplaced. That case involved a challenge to the

the threat of penalties as the price of exercising the right to challenge a statute or an administrative order effectively precludes the exercise of that right. There is nothing in either those cases or the Due Process Clause, however, that entitles a litigant who wishes to challenge an agency's interpretation of its own order to an automatic stay merely because substantial penalties may be imposed for violation of the order if the party turns out to have been mistaken in its interpretation of the order, under which it chose to proceed.[5]

In the present case, as the court of appeals noted (Pet. App. 14a), the amount of the penalties for violation is discretionary—up to $10,000 per violation; and if the district court concludes that petitioners' advertisements constituted a good-faith attempt to comply with the orders, there is no reason to believe that it would assess extremely severe penalties. As the Court of Appeals for the District of Columbia Circuit pointed out in holding that a district court had no jurisdiction to review the Commission's interpretation of its own order, despite the possibility of heavy

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validity of Commission orders, and noncompliance involved a mandatory penalty of $100 per day. The company had not sought a stay *pendente lite*, and the Court merely indicated in dictum that in such a case a stay might be granted if the " 'orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity.' " *Id.* at 226. The dictum is consistent with our submission in this case that petitioners have not made the showing necessary before the Due Process Clause may require a stay of penalties.

[5]Petitioners refer to the Commission's "acceptance" of their compliance reports (Pet. 5). The Commission's receipt of those reports and its letters to petitioners in December 1972, informing them that the agency had determined "that no compliance action by the Commission is indicated at this time," were conditioned "on the assumption that the information submitted is accurate and complete" (C.A. App. A160). The present dispute involves matters that the Commission claims either were not disclosed in the compliance reports, or were disclosed inaccurately or incompletely.

penalties: "There is room for leniency by the court, if petitioner's view of the meaning of the order is plausible and not defiant" (*Floersheim* v. *Engman*, 494 F.2d 949, 953). If the penalties imposed were so high that considering all the circumstances they amounted to an abuse of discretion by the district court, the court of appeals could correct that error on appeal. In any event, the amount and appropriateness of penalties is a matter to be considered if and when the court finds that petitioners have violated the orders.

A further factor militating against an automatic stay of penalties in this case is that petitioners are not challenging the validity of the Commission's orders. Indeed, under the consent stipulation they waived the right to do so (C.A. App. A24-A25). They challenge only the Commission's interpretation of the orders. If petitioners are liable for penalties, it is not because of anything that the Commission has done since it issued the orders, but because petitioners have failed to obey them.[6]

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[6]Petitioners' claim of a conflict with district court decisions would not warrant review by this Court, but is in any event unfounded. In *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285 (D. Del.), the court granted a stay only as to the accumulation of mandatory penalties under 15 U.S.C. 50 based on the company's failure to file a report as required by a Commission order it contended was illegal. *Id.* at 288. The court denied the company's request for a stay of discretionary penalties under 15 U.S.C. 45(*l*) concerning the company's compliance with a cease and desist order, and the court's dictum concerning such a stay was addressed to the company's claim that the Commission had delayed unreasonably in rejecting its compliance report.

Ford Motor Co. v. *Coleman*, 402 F. Supp. 475 (D. D.C.), affirmed *per curiam*, No. 75-870, April 19, 1976, supports rather than contradicts our submission. Although the court there granted a limited stay of penalties in a preenforcement action under the National Traffic & Motor Vehicle Safety Act until the court in the government's enforcement suit could preliminarily assess the merits of plaintiff's claims, it rejected the claim that the statute necessarily is unconstitu-

Assuming, *arguendo*, that petitioners themselves are entitled to initiate a judicial proceeding to challenge the Commission's interpretation of its orders (but cf. *Floersheim, sup a*), the Due Process Clause does not entitle them to an automatic stay of penalties while they conduct such litigation. In order to obtain a stay of penalties, petitioners must make the normal showing necessary to obtain equitable relief *pendente lite*. Both the district court and the court of appeals held that petitioners failed to make such a showing, and petitioners have not sought review of that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tional because it did not provide an automatic stay of administrative orders which may result in a civil penalty of up to $800,000. The court concluded that the cases of this Court upon which petitioners here rely do not recognize any constitutional right to "a 'free ride' to litigate without any risk of penalties * * * " (402 F. Supp. at 490).